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No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1988

THOMAS W. SPINDLE
SPECIALIST, UNITED STATES ARMY, PETITIONER

v.

THE UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

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QUESTIONS PRESENTED

I

WHETHER THE CONFRONTATION CLAUSE REQUIRES EXCLUSION OF THE PRIOR RECORDED BUT "PRESUMPTIVELY UNRELIABLE" TESTIMONY OF AN ACCOMPLICE, WHERE AN ACCUSED HAS HAD NO OPPORTUNITY TO CROSS-EXAMINE THE ACCOMPLICE CONCERNING NEW AND EXCULPATORY EVIDENCE DISCOVERED AFTER THE TESTIMONY WAS RENDERED.

II

WHETHER PRIOR RECORDED TESTIMONY OF AN ACCOMPLICE IS AUTOMATICALLY ADMISSIBLE AS AN EXCEPTION TO THE CONFRONTATION CLAUSE WHERE THE ACCOMPLICE (1) HAD MADE NUMEROUS INCONSISTENT STATEMENTS; (2) HAD A MOTIVE TO POINT THE FINGER OF CULPABILITY TO OTHERS; AND (3) IS UNAVAILABLE FOR CROSS-EXAMINATION CONCERNING NEW AND EXCULPATORY EVIDENCE DISCOVERED AFTER THE TESTIMONY WAS RENDERED.

III

WHETHER ADMISSION OF THE SELF-SERVING, CONTRADICTORY, AND "PRESUMPTIVELY UNRELIABLE" PRIOR RECORDED TESTIMONY OF AN ACCOMPLICE, AND THE INABILITY OF PETITIONER TO CROSS-EXAMINE THE ACCOMPLICE CONCERNING EVIDENCE DISCOVERED AFTER THE TESTIMONY WAS RENDERED, VIOLATED PETITIONER'S FIFTH AMENDMENT RIGHT TO DUE PROCESS.

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	1
Constitutional Provisions Involved	2
Statement of the Case	2
Statement of the Facts	3
Reasons for Granting the Writ:	8
I. WHERE AN ACCUSED IS DENIED THE OPPORTUNITY TO EFFECTIVELY CROSS-EXAMINE AN UNAVAILABLE DECLARANT, WHO WAS AN ACCOMPLICE, CONCERNING NEW AND EXCULPATORY EVIDENCE DISCOVERED AFTER THE ACCOMPLICE HAS FLED, THE GENERAL RULE OF ADMISSIBILITY OF PRIOR RECORDED TESTIMONY SHOULD NOT APPLY	8
II. A GRANT OF REVIEW IS NECESSARY TO RESOLVE WHETHER THE RELIABILITY PRONG OF *OHIO V. ROBERTS* MUST BE SATISFIED WHEN THE PRIOR RECORDED TESTIMONY OF AN UNAVAILABLE ACCOMPLICE IS OFFERED OVER DEFENSE OBJECTION	10
III. ADMISSION OF THE PRIOR TESTIMONY OF AN ACCOMPLICE, UNDER THE CIRCUMSTANCES OF PETITIONER'S CASE, VIOLATED PETITIONER'S RIGHT TO DUE PROCESS	10
Appendix A	1a
Appendix B	1b
Appendix C	1c

TABLE OF AUTHORITIES

Cases:

Bourjaily v. United States, 483 U.S. 171 (1987)	10, 11
Brady v. Maryland, 373 U.S. 83 (1963)	8
California v. Green, 399 U.S. 149 (1970)	12

Cases – Continued: Page

Chambers v. Mississippi, 410 U.S. 284 (1973) 8
Chapman v. California, 386 U.S. 18 (1967) 10, 12
Coy v. Iowa, 108 S.Ct. 2798 (1988) 12
Davis v. Alaska, 415 U.S. 308 (1974) 9
Delaware v. Van Arsdall, 475 U.S. 673 (1986) 8
Douglas v. Alabama, 380 U.S. 415 (1965) 8
Dutton v. Evans, 400 U.S. 74 (1970) 10
Lee v. Illinois, 476 U.S. 530 (1986) 10, 11
Ohio v. Roberts, 448 U.S. 56 (1980) 6, 10, 11, 13
Pennsylvania v. Ritchie, 480 U.S. 39 (1987) 8, 9
Schneble v. Florida, 405 U.S. 427 (1972) 10
United States v. Hubbard, 28 M.J. 27 (C.M.A. 1989) ... 6, 11
United States v. Spindle, 28 M.J. 35 (C.M.A. 1989) 6

Constitutional Provisions and Statutes:

U.S. Const. amend. V 2
amend. VI 2
10 U.S.C. § 832 (1982) 4
10 U.S.C. § 880 (1982) 2
10 U.S.C. § 918 (1982) 2
10 U.S.C. § 934 (1982) 2
28 U.S.C. § 1259(3) (Supp. II 1984) 2

Other Materials and Authorities:

Fed. R. Crim. P. 33 8
Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 601(d)(2) 4

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No.

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v.

THE UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

The Petitioner, Thomas W. Spindle, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Military Appeals entered in this proceeding.

OPINIONS BELOW

The Court of Military Appeals affirmed the decision of the Army Court of Military Review by decision dated March 10, 1989. The opinion of the Court of Military Appeals appears at 28 M.J. 35 (C.M.A. 1989) (Appendix A). Petitioner timely filed a motion for reconsideration with the Court of Military Appeals. On May 9, 1989, the Court denied the motion for reconsideration (Appendix B). The opinion of the Army Court of Military Review was unpublished (Appendix C).

JURISDICTION

On May 9, 1989, the Court of Military Appeals denied petitioner's timely motion for reconsideration of that court's

March 10, 1989, decision affirming petitioner's conviction and the judgment below. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3) (Supp. II 1984).

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitution of the United States provides:

> Amendment V: "No person shall be . . . deprived of life, liberty, or property, without due process of law. . . ."
> Amendment VI: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ."

Statement of the Case

Contrary to his pleas, petitioner was convicted by a general court-martial of assault with intent to commit sodomy, felony murder, attempted sodomy, and indecent acts with a minor.[1] The Army Court of Military Review dismissed petitioner's conviction for assault with intent to commit sodomy as multiplicious with his conviction for attempted sodomy (Appendix C). The pertinent issues granted by the United States Court of Military Appeals, as a prerequisite to this Court's jurisdiction, were as follows:

I.

WHETHER THE EVIDENCE OF RECORD IS INSUFFICENT AS A MATTER OF LAW TO SUPPORT THE FINDINGS OF GUILTY.

II

WHETHER APPELLANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO CONFRONT THE PRIMARY WITNESS AGAINST HIM.

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[1] These offenses constitute violations of Uniform Code of Military Justice arts. 134, 118, 80, 10 U.S.C. §§ 934, 918, 880 (1982).

III

WHETHER THE MILITARY JUDGE ERRED BY REFUSING TO ALLOW THE DEFENSE TO PRESENT EXTRINSIC EVIDENCE RELEVANT TO THE CREDIBILITY OF PRIVATE COURTNEY, THE CHIEF WITNESS AGAINST PETITIONER.

Over four years after petitioner filed pleadings with the Court of Military Appeals, that Court issued its opinion affirming appellant's conviction and the sentence (Appendix A).

Statement of Facts

A. Background.

Petitioner's coaccused, Private Clifford B. Hubbard, was tried separately. The prosecution's primary witness was Private Joseph H. Courtney, who implicated Hubbard and petitioner in the alleged murder and attempted sodomy of a teenaged boy. Courtney, who had made numerous inconsistent statements either denying knowledge of the offense or implicating others, testified at petitioner's pretrial investigation. He fled prior to petitioner's trial, but resurfaced thereafter.

The deceased was Derek Kusumoto (Prosecution Exhibit 32), a teenager who suffered from severe asthma (R. 382-83). His body was found on February 6, 1982, face down, at the bottom of a flight of steps leading into a bunker (Prosecution Exhibit 7). The deceased had a human bitemark on his chest above his left nipple (R. 532-33, 910-11).

Lieutenant Colonel Larry O'Neil was a dentist and forensic odontologist who examined the bitemark on the deceased's chest (R. 910-37). Courtney and a close friend, Private Joseph C. Hanson, fled prior to Dr. O'Neil's determination that the bitemark was made within two hours prior to death, and that someone other than petitioner, Hubbard, or Courtney had made the bitemark (R. 916-18, 930). Additionally, Mr. Phillip

Mills, a laboratory technician for the Criminal Investigation Command, also testified that the blood type of the saliva found in the bitemark eliminated petitioner as the person who bit the decedent. Courtney had sworn at a pretrial investigation that only he, Hubbard, and petitioner had been present at the time of death. No teeth imprints, however, were made of Hanson prior to trial.

Petitioner found the body of the deceased. A medical examiner subsequently determined that the deceased died of asphyxiation (R. 520). Investigators focused suspicion on petitioner because he had stated that the boy was wearing striped socks (R. 564, 848, 853-54). When investigators found the body, the socks were rolled down so that the stripes on the socks were not exposed (R. 645, 853-54; Prosecution Exhibit 7). Only two hairs discovered on the deceased's clothing, however, were somewhat consistent with petitioner's hair (R. 617-20, 622, 626-27).

B. Testimony of Courtney at the Pretrial Investigation.[2]

In all, Courtney made seven pretrial statements, but never admitted involvement in the deceased's death, except to confess to being an accessory after the fact in hiding the body (R. 750, 815-17). He alternatively (1) denied any knowledge of the offense; or (2) claimed to have heard screams of a youth in the shadows with petitioner and Hubbard; or (3) claimed to have witnessed the sodomy and death of the victim before helping dispose of the body. The medical examiner, however, found no trauma or sperm in or about the deceased's anus (R. 529), and no dirt in the nose or mouth of the deceased (R. 534).

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[2] In the military justice system, a pretrial investigation is mandatory for "general" courts-martial. Only "general" courts-martial can impose confinement in excess of six months, forfeitures in excess of two-thirds pay per month for six months, or a dishonorable discharge. *See* Uniform Code of Military Justice art. 32, 10 U.S.C. § 832 (1982); Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 601(d)(2).

On March 16, 1982, Courtney testified under oath at a pretrial investigation hearing that he had not gone near the crime scene on the night of the death (R. 715). He indicated that he had been in his quarters sleeping from 10 p.m. until 4 a.m. the following morning (R. 722). On March 18, 1982, again at the pretrial investigation, Courtney developed yet another version of events. Courtney stated that he took no part in the death of the deceased, but assisted in moving the body to the bunker. Courtney also stated that Hubbard and petitioner wrestled with the deceased, and pulled down the deceased's pants (R. 737, 763, 795-98). Courtney also indicated that when he tried to interfere Hubbard knocked him down (R. 740, 809-10). Courtney swore that Hubbard attempted anal intercourse with the deceased, while petitioner muffled the deceased's screams with his hands (R. 739, 745-46, 764). Courtney also testified that after the deceased went into a seizure, he took the deceased's pulse, and determined him to be dead (R. 748-49, 814-15).

Courtney freely admitted he had given several different statements to investigators concerning the events surrounding the decedent's death (R. 755-57). Furthermore, he stated that he had "no reason" for concocting his various stories (R. 755-56). Courtney, however, fled prior to trial. Therefore, neither petitioner nor Hubbard had the opportunity to cross-examine Courtney in front of the jurors regarding the inconsistent statements as well as the bitemark evidence which came to light shortly before trial.

C. Litigation of the Confrontation Issue at Trial.

When Courtney's absence at the time of trial became evident, the Government sought to admit Courtney's pretrial hearing testimony based on the inference of reliability of testimony coming within a "firmly rooted hearsay exception." Petitioner objected to admission of the prior statements, arguing that testimony at a military pretrial investigation does not fall within a firmly rooted hearsay exception. Petitioner also contested the Government's position that Courtney was

not reasonably available. Finally petitioner argued that admission of the pretrial statement of Courtney violated his sixth amendment right of confrontation.

The military judge denied petitioner's confrontation motion, and permitted the Government to read the March 16 and 18, 1982 statements of Courtney to the jury. The military judge did not admit written prior nconsistent statements, which were part of the seven pretrial statements made by Courtney and which the defense sought to admit to impeach the pretrial hearing testimony admitted by the judge. The military judge also refused to allow petitioner to introduce evidence that Courtney had stolen money from another soldier just prior to disappearing. Petitioner presented Lieutenant Colonel O'Neil's testimony regarding the bitemark evidence on the merits, but had no opportunity to cross-examine Courtney thereon.

D. Decisions Below.

Both the Army Court of Military Review and the Court of Military Appeals held that testimony given at a military pretrial investigation under oath and subject to cross-examination is admissible "without more" because it falls within a firmly rooted hearsay exception. Furthermore, the Court of Military Appeals, by reference to its decision in Hubbard's case, held that "factual reliability does not have to be established." *United States v. Spindle*, 28 M.J. 35, 36 (C.M.A. 1989) (Appendix A) (comparing petitioner's case with *United States v. Hubbard*, 28 M.J. 27 (C.M.A. 1989)). Petitioner moved for reconsideration of the court's decision, arguing that *Ohio v. Roberts*, 448 U.S. 56 (1980), created only a rebuttable inference that prior recorded testimony bears indicia of reliability. Petitioner argued that in cases such as his, where the prior recorded testimony is that of an admitted accomplice, factual reliability must be established. The Court of Military Appeals denied the motion for reconsideration.

QUESTIONS PRESENTED

I

WHETHER THE CONFRONTATION CLAUSE REQUIRES EXCLUSION OF THE PRIOR RECORDED BUT "PRESUMPTIVELY UNRELIABLE" TESTIMONY OF AN ACCOMPLICE, WHERE AN ACCUSED HAS HAD NO OPPORTUNITY TO CROSS-EXAMINE THE ACCOMPLICE CONCERNING NEW AND EXCULPATORY EVIDENCE DISCOVERED AFTER THE TESTIMONY WAS RENDERED.

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REASONS FOR GRANTING THE WRIT

I. WHERE AN ACCUSED IS DENIED THE OPPORTUNITY TO EFFECTIVELY CROSS-EXAMINE A DECLARANT, WHO WAS AN ACCOMPLICE, CONCERNING NEW AND EXCULPATORY EVIDENCE DISCOVERED AFTER THE ACCOMPLICE HAS FLED, THE GENERAL RULE OF ADMISSIBILITY OF PRIOR RECORDED TESTIMONY SHOULD NOT APPLY.

In *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987), Justice Powell recognized two exceptions to the general rule that the admission of prior recorded testimony of an unavailable declarant does not violate the sixth amendment. *Id.* at 54 n.10. In particular, Justice Powell recognized a "Confrontation Clause infringement" under two scenarios: (1) where the prosecution withholds relevant discoverable evidence; and (2) where there is a specific statutory or court-imposed limit on the scope or nature of defense counsel's cross-examination.[3] Petitioner requests grant of review of the issue of whether the confrontation clause bars admission of prior recorded testimony in a third scenario: *where an accused has no opportunity to effectively cross-examine an accomplice concerning new, significant, and exculpatory evidence discovered after the rendering of that witness' prior testimony.*

Brady v. Maryland, 373 U.S. 83 (1963), and its progeny, and Rule 33 of the Federal Rules of Criminal Procedure (new trial petitions), stand for the proposition that a criminal accused must have access to all relevant evidence for there to be due process. When the Government denies the accused access to discoverable evidence as in *Brady*, or where new evi-

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[3] Footnote ten of Justice Powell's opinion in *Pennsylvania v. Ritchie* lists cases supporting this latter proposition (citing, *inter alia*, Delaware v. Van Arsdall, 475 U.S. 673 (1986) (denial of right to cross-examine to show bias); Chambers v. Mississippi, 410 U.S. 484 (1973) (denial of right to impeach own witness); Douglas v. Alabama, 380 U.S. 415 (1965) (denial of right to cross-examine codefendant)).

dence arises subsequent to trial, the result is the same—an accused may be entitled to a new trial. In either case, the accused may demonstrate that the lack of relevant evidence denied him the opportunity to *effectively* cross-examine the witness against him and "to delve into the witness' story to test the witness' perceptions and memory [and] . . . to impeach, *i.e.*, discredit the witness." *Davis v. Alaska*, 415 U.S. 308, 316 (1974).

As pointed out by Justice Blackmun, in his criticism of the plurality decision in *Pennsylvania v. Ritchie*, "confrontation" under the sixth amendment means more than the "empty formality" of a mere opportunity to cross-examine witnesses; "confrontation" means *effective* cross-examination which "call[s] into question a witness' credibility." *Pennsylvania v. Ritchie*, 480 U.S. at 62 (Blackmun, J., concurring in part and concurring in the judgment). Thus, Justice Blackmun joined in the plurality decision in *Pennsylvania v. Ritchie* remanding the case to determine whether Ritchie had been improperly denied access to a witness' medical treatment records which contained "information that may have changed the outcome of his trial had it been disclosed." *Pennsylvania v. Ritchie*, 480 U.S. at 61.

In petitioner's case, counsel for the defense could not *effectively* cross-examine Courtney without the knowledge that someone other than petitioner, Hubbard, or Courtney had inflicted the bitemark on the deceased.[4] Cross-examination in light of that evidence was essential to delve into Courtney's story, to test his perceptions and memory, to discredit his credibility, and, most importantly, to discredit Courtney's implication of petitioner. *See Davis v. Alaska*, 415 U.S. 308 (1974). In order for there to have been *effective* cross-examination of Courtney, petitioner required the opportunity

[4] While petitioner does not allege bad faith on the part of the Government in frustrating his right to face-to-face confrontation of Courtney regarding the bitemark evidence, the Government was (1) responsible for the timely investigation of the bitemark evidence; and (2) responsible for the failure to place restrictions on Courtney's freedom of movement prior to trial.

to ask Courtney who had inflicted the bitemark on the deceased, and why Courtney sought to deceive regarding the events in question. As pointed out by Justice Brennan, in *Lee v. Illinois*, 476 U.S. 530, 545 (1986), "a codefendant's confession is *presumptively unreliable* as to the passages detailing the defendant's conduct or culpability because those *passages may be the product of a codefendant's desire to shift or spread blame, curry favor, avenge himself, or divert attention to another*" (emphasis added).[5]

As this issue is one of constitutional dimension, it cannot be said that the absence of the opportunity to confront and cross-examine Courtney concerning the subsequently discovered bitemark evidence was harmless beyond a reasonable doubt. *See Chapman v. California*, 386 U.S. 18 (1967); *see also Lee v. Illinois*, 476 U.S. at 547 (citing *Schneble v. Florida*, 405 U.S. 427 (1972)).

II. A GRANT OF REVIEW IS NECESSARY TO RESOLVE WHETHER THE RELIABILITY PRONG OF *OHIO V. ROBERTS* MUST BE SATISFIED WHEN THE PRIOR RECORDED TESTIMONY OF AN UNAVAILABLE ACCOMPLICE IS OFFERED OVER DEFENSE OBJECTION.

III. ADMISSION OF THE PRIOR TESTIMONY OF AN ACCOMPLICE, UNDER THE CIRCUMSTANCES OF PETITIONER'S CASE, VIOLATED PETITIONER'S RIGHT TO DUE TO PROCESS.

In *Bourjaily v. United States*, 483 U.S. 171 (1987), this Court held that "indicia of reliability"[6] need not be shown for coconspirator statements, made in the course of a conspiracy, in order for such statements to be admissible. *Id.* at 183-84. Citing *Bourjaily*, the Court of Military Appeals held that

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[5] Similarly, Justice Marshall in his dissent to Dutton v. Evans, noted that accomplice statements are so inherently prejudicial that cross-examination is a minimal requirement. Justices Black, Douglas, and Brennan joined Justice Marshall in the dissent in Dutton v. Evans, 400 U.S. 74, 110 (1970).

[6] *See* Ohio v. Roberts, 448 U.S. 56, 66 (1980).

"factual reliability does not have to be established as a prerequisite for admitting hearsay evidence pursuant to well-recognized hearsay exceptions." *United States v. Hubbard*, 28 M.J. 27, 33 (C.M.A. 1989). Thus, the Court of Military Appeals upheld the admission of Courtney's presumptively unreliable accomplice testimony merely because it was prior recorded testimony. *See Lee v. Illinois*, 476 U.S. at 530 (1986).

Ohio v. Roberts, 448 U.S. 56 (1988) created only a *rebuttable inference* of reliability for hearsay that falls into a recognized hearsay exception. Accordingly, petitioner requests that this Court grant review to determine whether the reliability prong of *Ohio v. Roberts* is applicable to prior recorded testimony of an accomplice whose incriminating declaration is not made in the furtherance of the conspiracy. *See generally Lee v. Illinois*, 476 U.S. at 530.[7]

While petitioner acknowledges that reliability *may* be inferred where a prior recorded statement is subject to effective cross-examination, an accused *may* rebut the inference of reliability of "presumptively unreliable" accomplice testimony. *See Id.* Furthermore, the issue is not merely whether Courtney's sworn statement, in general, is reliable. The issue is whether Courtney's testimony "could not be trusted as regards [*petitioner's*] participation in the [murder]." *Id.* at 544. Reliability may be inferred, but should not automatically be inferred, where prior recorded testimony is that of a presumptively unreliable accomplice who is no longer subject to cross-examination concerning his prior inconsistent statements or newly discovered evidence.

Petitioner has been denied the right to effectively confront Courtney "face-to-face" at trial, and has been frustrated in his attempt to demonstrate that the "inference" of reliability of

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[7] *See generally* Bourjaily v. United States, 483 U.S. at 182 ("[W]hen the hearsay statement is the out-of-court declaration of a co-conspirator [made during the course of a conspiracy] . . . we conclude that the second inquiry [of *Ohio v. Roberts*], independent indicia of reliability, is also not mandated by the Constitution.")

Courtney's accomplice testimony should not apply. *See generally Coy v. Iowa,* 108 S.Ct. 2798 (1988). Furthermore, the denial of confrontation has precluded petitioner from the exercise of effective cross-examination of Courtney, who was the Government's key witness tying petitioner to the crime. The military judge erred to petitioner's prejudice by trying petitioner without the presence of Courtney.

Petitioner suffered a denial of his right to confront and effectively cross-examine Courtney—before the fact finder—regarding Courtney's sworn prior inconsistent statements. As pointed out in *Coy v. Iowa,* the accuser should meet the accused face-to-face and "*the trier of fact will draw its own conclusions.*" *Id.* at 2802 (emphasis added). It is essential that the defendant be afforded " 'a right to *meet face to face* all those who appear and give evidence *at trial.*' " *Id.* at 2803 (citing *California v. Green,* 399 U.S. 149, 175 (1970) (Harlan, J., concurring)) (emphasis in original).

The denial of the sixth amendment right to face-to-face confrontation of Courtney, "*at trial,*" regarding the bitemark evidence and Courtney's prior inconsistent statements, constitutes a fifth amendment due process violation. The Government has provided the fact finder presumptively unreliable accomplice testimony, and sanctioned its use as presumptively reliable since the "opportunity" to cross-examine existed at the pretrial investigation. The rulings of the trial judge vitiated petitioner's fifth and sixth amendment right to have the fact finder see "[t]he profound effect upon [Courtney] of standing in the presence of the person [he] accused." *Id.* at 2802. Thus petitioner is entitled to a new trial, and to face-to-face confrontation with Courtney.

The error of the trial judge in admitting the recorded, presumptively unreliable, accomplice testimony of Courtney, in the absence of proof of reliability, is not harmless beyond a reasonable doubt. *See Chapman v. California,* 386 U.S. at 18 (1967).

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CONCLUSION

A grant of review of petitioner's case offers this Court the opportunity to address the limits of the "firmly rooted hearsay" exception set out in *Ohio v. Roberts* in the context of accomplice testimony. Furthermore, the issues presented offer the Court a unique opportunity to address the question of whether a defendant may be denied the effective right to cross-examination by the inability to cross-examine an accomplice regarding evidence which is discovered after the declarant becomes unavailable. Under the circumstances of petitioner's case, this Court may squarely face the issue of whether there is a *per se* rule of admissibility for any prior recorded testimony, including presumptively unreliable accomplice testimony, so long as it is subject to cross-examination to some minimal degree.

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APPENDIX A

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UNITED STATES COURT OF MILITARY APPEALS

No. 51,123
CM 443294.

UNITED STATES, APPELLEE,

v.

SPECIALIST FOUR THOMAS W. SPINDLE, U.S. ARMY,
APPELLANT

March 10, 1989

For Appellant: *Lieutenant Colonel Arthur L. Hunt, Major Stephen R. Dooley, Captain David L. Carrier* (on brief).

For Appellee: *Colonel James Kucera, Lieutenant Colonel Adrian J. Gravelle, Lieutenant Colonel Gary F. Roberson, Captain Patrick J. Cunningham, Captain Erik M. Stumpfel* (on brief); *Lieutenant Colonel Thomas M. Curtis.*

Opinion of the Court

EVERETT, Chief Judge:

A general court-martial composed of officers tried appellant on charges identical with those on which his co-accused was tried a few days later. *See United States v. Hubbard*, 28 MJ 27 (CMA 1989).[1] The Government's evidence in the two cases was almost identical – except that, unlike Hubbard, Spindle had made some incriminating admissions which were received in evidence at his trial. The findings

[1] Charge I alleged premeditated murder and felony murder in separate specifications; Charge II alleged sodomy; and the Additional Charge alleged committing indecent acts, in violation of Articles 118, 125, and 134, Uniform Code of Military Justice, 10 USC §§ 918, 925, and 934, respectively. The accused was convicted under Charge II of attempted sodomy, which is a violation of Article 80, UCMJ, 10 USC § 880.

made by each court-martial were to the effect that the accused had murdered Derek K during an attempt to commit sodomy and also had committed attempted sodomy and indecent acts against the victim. Spindle was also convicted of assault with intent to commit sodomy.[2] Not surprisingly, the issues raised in this Court by Spindle and the arguments in support thereof parallel to a considerable extent those raised by Hubbard; and we reach a result here similar to that arrived at in Hubbard's case.

I

Appellant's principal contention is that the former testimony of an alleged eyewitness, Joseph Courtney, should not have been received, because to do so violated Mil.R.Evid. 804(b)(1), Manual for Courts-Martial, United States, 1969 (Revised edition), and the Sixth Amendment. However, we conclude that the prosecution offered evidence which adequately supported the military judge's determination "that the Government has made all reasonable efforts to obtain the presence of Private Joseph Courtney, and that he is, in fact, unavailable at" the time of Spindle's trial. Indeed, the evidence leaves no doubt that prosecutorial authorities made the requisite "good-faith effort to obtain [Courtney's] presence at trial." *See Barber v. Page*, 390 U.S. 719, 725, 88 S.Ct. 1318, 20 L.Ed.2d 255 (1968).

Once Courtney's unavailability had been established, the court-martial was entitled to consider his testimony, which had been recorded verbatim at the Article 32, Uniform Code of Military Justice, 10 USC § 832, hearing and which had been subjected at that time to extensive cross-examination by counsel for both accused. *Cf. United States v. Hubbard, supra; United States v. Connor*, 27 MJ 378 (CMA 1989); *see also Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d

[2] The Court of Military Review found that the convictions for attempted sodomy and assult with intent to commit sodomy were multiplicious and dismissed the latter specification. However, they affirmed the findings of guilty of committing indecent acts.

597 (1980). Absent any suppression of evidence by the prosecution, admissibility of the former testimony is unaffected by the circumstance that, during the pretrial investigation, defense counsel lacked information that would have been useful in cross-examining Courtney if he had testified at trial. *See United States v. Hubbard, supra.*

Appellate defense counsel also complain that the defense was not allowed to introduce extrinsic evidence that Courtney had stolen $247.00 from a fellow soldier at the time he absented himself without authority a few days before Spindle's trial. If Courtney had been present to testify, he could have been cross-examined about the larceny to the extent that the military judge, in his discretion, considered that this misconduct related to the witness' credibility. Generally, however, extrinsic evidence of a witness' misconduct – short of a conviction – is not received to impeach his credibility. *Cf.* Mil.R.Evid. 608(b); *United States v. Cottle,* 14 MJ 260, 265 (CMA 1982). An exception is made when the extrinsic evidence of misconduct tends to show that the witness has bias, prejudice, or a motive to misrepresent, Mil.R.Evid. 608(c); but we see no reason why that exception would apply in this case.

We observed in *Connor* that, if former testimony of an absent witness is received, the judge has discretion under the Military Rules of Evidence to allow introduction of an inconsistent statement made by the witness after he had given his testimony.[3] 27 MJ at 390-91. Perhaps some discretion exists for the judge to allow the reception of extrinsic evidence as to misconduct by an absent witness, if the military judge concludes that this is necessary in order for the factfinder properly to evaluate the witness' credibility. However, the judge certainly is not compelled to admit such evidence and thereby to propel the factfinder into a mini-trial of a collateral issue. *Cf. United States v. Cottle, supra* at 264. Thus, the military judge ruled properly in excluding the extrinsic evidence of Courtney's misconduct.

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[3] This result is different from that reached in *Mattox v. United States,* 156 U.S. 237, 15 S.Ct. 337, 39 L.Ed. 409 (1895).

Furthermore, as the court below observed, if there had been error in this ruling, it could not have prejudiced Spindle. There was a plethora of other evidence before the court members as to Courtney's truthfulness. We are convinced beyond a reasonable doubt that the court members' consideration of the extrinsic evidence of a larceny by Courtney would have had no effect on their determination that, in many respects, his former testimony at the Article 32 hearing was credible.

II

Spindle also maintains that the Government's evidence was insufficient to establish his guilt. In this trial, the Government offered virtually the same evidence offered in Hubbard's trial, plus damaging admissions by Spindle. Since we have upheld the sufficiency of the evidence as to Hubbard, *United States v. Hubbard*, 28 MJ at 33-34, it follows *a fortiori* that the evidence as to Spindle was sufficient.

III

The decision of the United States Army Court of Military Review is affirmed.

Judge COX concurs.

Judge SULLIVAN did not participate.

APPENDIX B

UNITED STATES COURT OF MILITARY APPEALS

USCMA Dkt. No. 51123/AR
CMR Dkt. No. 443294

UNITED STATES, APPELLEE,

v.

THOMAS W. SPINDLE (227-70-4281), APPELLANT

ORDER

On consideration of appellant's petition for reconsideration of the Opinion of the Court, 28 MJ 35 (CMA 1989), it is by the Court, this 9th day of May, 1989,

ORDERED:

That said petition is hereby denied.

Judge SULLIVAN did not participate.

For the Court,

/s/ John A. Cutts, III
Deputy Clerk of the Court

APPENDIX C

UNITED STATES ARMY COURT
OF MILITARY REVIEW
HQ, USA Western Command

CM 443294

UNITED STATES, APPELLEE,

v.

SPECIALIST FOUR (E-4), THOMAS W. SPINDLE,
SSN 227-70-4281, UNITED STATES ARMY, APPELLANT

MEMORANDUM OPINION

Before MARDEN, PAULEY and WERNER, Appellate Military Judges

G. C. Ryker, Military Judge

Captain Gunther O. Carrle, JAGC, argued the cause for the appellant. With him on the brief were Lieutenant Colonel William P. Heaston, JAGC, and Major Edwin D. Selby, JAGC.

Captain Patrick J. Cunningham, JAGC, argued the cause for the appellee. With him on the brief were Colonel James Kucera, JAGC, Lieutenant Colonel Adrian J. Gravelle, JAGC, and Lieutenant Colonel Thomas M. Curtis, JAGC.

WERNER, Judge:

Contrary to his pleas, appellant was convicted of felony murder, attempted sodomy, assault with intent to commit sodomy, and indecent, lewd and lascivious acts with a child in violation of Articles 118, 80, and 134, Uniform Code of Military Justice. A court with members sentenced him to a dishonorable discharge, confinement at hard labor for life, forfeiture of $275.00 pay per month, and reduction to Private E-1. The convening authority approved the sentence.

Among the issues presented for resolution are: whether the evidence was insufficient to establish appellant's guilt; and whether appellant's constitutional right to confront the Government's primary witness was abridged by admission of that witness' former testimony at a pretrial hearing conducted pursuant to Article 32, Uniform Code of Military Justice. *See* Military Rule of Evidence 804(b)(1). On the basis of the evidence of record, we find the evidence legally and factually sufficient and the admission of the witness' former testimony proper. *See United States v. Hubbard*, 18 M.J. 678 (ACMR 1984).

Appellant also contends that the military judge erred by refusing to allow him to present evidence attacking the credibility of the Government's key witness. The witness, Private Courtney, had allegedly stolen $247.00 from a Specialist Stewart while visiting the latter's room. According to the defense's offer of proof, Specialist Stewart would testify that during his brief absence from the room Courtney took the money from a wallet left unattended on a dresser. It was the defense's position that this information was probative of Courtney's character for untruthfulness and that it should have been admitted because the defense did not have the opportunity to cross-examine Courtney. We disagree. As noted by the military judge in refusing to allow Stewart's testimony, specific instances of misconduct not amounting to a conviction of a crime may not be proved by extrinsic evidence where the purpose of its admission is to attack or support credibility of the witness. Military Rule of Evidence 608(b). *See also United States v. Gonzalez*, 16 M.J. 423 (CMA 1983); *United States v. Banker*, 15 M.J. 207 (CMA 1983); *United States v. Hunter*, 17 M.J. 738 (ACMR 1983). Although the military judge has discretion to allow inquiry into such matters on cross-examination where the proffered evidence is probative of the witness' character for truthfulness or untruthfulness or where it would tend to show his bias, prejudice or motive to misrepresent, neither of these conditions was shown in this case. *See* Military Rule of Evidence 608(c).

The burden of making such minimal showing of relevancy is upon the party proffering the evidence. *United States v. Hunter, supra.* Furthermore, considering the vast quantum of impeaching evidence against Courtney that had already been admitted, we fail to see how the absence of Stewart's testimony could have prejudiced appellant. *United States v. Banker, supra.*

Finally, we hold that on the facts of this case, the offenses of attempted sodomy and assault with intent to commit sodomy are multiplicious for findings because they are factually indistinguishable. *United States v. Gibson,* 11 M.J. 435 (CMA 1981). We will therefore dismiss the latter since it carries the lesser maximum punishment. Conversely, the evidence reveals that the indecent assault upon the child victim preceded the attempted sodomy and felony murder and was not part of a continuous course of misconduct that culminated in those more serious offenses. *See United States v. Baker,* 14 M.J. 361 (CMA 1983). The remaining assignments of error are without merit.

The finding of guilty of Specification 1 of Charge I is set aside and that specification is dismissed. The remaining findings of guilty and the sentence are affirmed.

Senior Judge MARDEN and Judge PAULEY concur.

FOR THE COURT:

/s/ Thaddeus J. Placzkouski
for WILLIAM S. FULTON, JR.
Clerk of Court

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